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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-012936

11/18/2013

HON. RANDALL H. WARNER

CLERK OF THE COURT

K. Ballard

Deputy

XCENTRIC VENTURES L L C

MARIA CRIMI SPETH

v.

MICHAEL ROBERTS, et al.

CHRISTOPHER B INGLE

UNDER ADVISEMENT RULING

Plaintiff Xcentric Ventures, LLC's ("Xcentric") application for preliminary injunction is under advisement following an evidentiary hearing and post-hearing briefs. Based on the evidence and arguments presented, the court makes the following findings, conclusions and orders.

1. Legal Standard.

To obtain a preliminary injunction, Xcentric must show:

1. A strong likelihood of success on the merits at trial;
2. The possibility of irreparable injury if a preliminary injunction is not granted;
3. The balance of hardships favors a preliminary injunction; and
4. Public policy favors an injunction.

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IB Property Holdings, LLC v. Rancho Del Mar Apartments Ltd. Partnership, 228 Ariz. 61, 64-65, 263 P.3d 69, 72-73 (App. 2011). Application of these factors may be on a sliding scale. That is, a preliminary injunction may issue if there is either probable success on the merits and the possibility of irreparable injury, or the presence of serious questions on the merits and the balance of hardships tips sharply in favor of relief. *Arizona Citizens Clean Elections Com'n v. Brain*, 2013 WL 5761620, *8 (Ariz. App. 2013).

2. The Merits.

Xcentric's claim for a preliminary injunction is based on alleged tortious interference with contract and business expectancy. Xcentric did not show that Defendants have induced breaches of contract, but did prove that Defendants have intentionally damaged Xcentric's business. Indeed, the statements of Defendant Michael Roberts make plain that his objective is to interfere with Xcentric's business.

The elements of tortious interference with business expectancy are:

1. A valid business expectancy;
2. Knowledge of the relationship or expectancy;
3. Intentional interference inducing or causing a termination of the relationship or expectancy;
4. Resultant damage; and
5. An improper motive or means.

Miller v. Servicemaster by Rees, 174 Ariz. 518, 521, 851 P.2d 143, 146 (App. 1992). Based on the evidence, the court finds that the first four elements have been met. Xcentric has a valid business expectancy with respect to its customers, who pay it to participate in and be listed on its website as part of its "Verify Program." Defendants know of this relationship, and their actions are designed to interfere with it. They object to Xcentric's business practices and have set out to shame Xcentric's customers into ceasing to do business with it. And they have succeeded in causing that damage. Some customers have ceased doing business with Xcentric and unknown others have refrained from doing so due to the negative publicity that Defendants will cause.

The difficult element is whether Defendants' actions are "improper." It is difficult because of the interplay between the tort of interference with business expectancy and the first amendment.

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As a matter of law, statements or actions amounting to protected speech are not “improper” for tort purposes. *See, e.g., Gardner v. Martino*, 563 F.3d 981, 992 (9th Cir. 2009) (“[W]hen a claim of tortious interference with business relationships is brought as a result of constitutionally-protected speech, the claim is subject to the same first amendment requirements that govern actions for defamation.”). Thus, for example, if someone wants to post on the internet a negative opinion about a business, that is protected speech even if the posting is designed to negatively affect a business by steering customers away. On the other hand, threats and extortion are not protected speech. *See, e.g., State v. Jacobs*, 119 Ariz. 30, 33, 579 P.2d 68, 71 (App. 1978) (attempting to obtain monetary gain by threatening or promising unlawful conduct is not protected speech); *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012) (extortionate threats are not protected speech). So which is it here: a constitutionally protected internet boycott or economic extortion?

The answer is a little of both. Criticizing someone for doing business with a company one wishes to boycott is protected speech, even if hyperbole or extreme language is used. Threatening to shut down someone’s business through defamatory internet postings is not.

The following hypothetical illustrates the fine line between improper economic extortion and protected speech. Believing that a local clothing shop sells products made with slave labor, a local group stages a boycott. They stand outside the shop and take note of who is entering. They tell customers that anyone shopping there will be listed on their website as a customer who supports slave labor. And then they make good on the threat. This kind of protest is protected speech.

What if instead of exposing the customers for patronizing the shop, the protestors threaten to list shoppers on the internet as sex offenders? This is not constitutionally protected speech and would be “improper” for tort purposes. Threatening to defame someone is not constitutionally protected, even if done for noble purposes.

Moreover, even exposing or threatening to expose *true* facts about someone is not protected speech if done to coerce some unrelated action. This is true even if disclosing those facts would itself be constitutionally protected. For example, while maintaining a website listing local sex offenders is constitutionally protected, the first amendment does not protect threatening to expose someone as a sex offender unless he or she stops patronizing the local clothing shop that sells products made with slave labor. And it is not just the threat that lacks first amendment protection, it is the disclosure that makes good on the threat. Both are extortion. Neither is constitutionally protected.

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Applying these principles, Defendant Roberts is free to stage an internet boycott of Xcentric, and is free to include in the boycott those who do business with it. Both his threat to boycott those who do business with Xcentric and his postings that make good on the threat are protected speech, so long as all he does is expose their decision to do business with Xcentric. What he may not do is post false information about those businesses. Nor may he post other negative information (including pure opinion) that is unrelated to Xcentric if the purpose of doing so is to coerce customers not to do business with Xcentric. These things are extortion, and they are not constitutionally protected.

Turning to the postings in this case, the court finds that everything in [authorizedstatement.org](#) and [badforpeople.com](#) consists of protected speech. In those websites, Roberts effects his protest against Xcentric advocating the boycott of companies that do business with Xcentric. And while he uses extreme metaphor and hyperbolic language, no reasonable reader would take that language to mean that either Xcentric or its customers are actually terrorists.

The parties argue over whether Xcentric is a “consumer advocacy website” or a “legally shielded extortion scheme,” but the court neither can nor must decide whether Xcentric wears a black hat or a white one. There may be different opinions about Xcentric on the internet and it is not the role of the court to enforce one over the other.

The [scamgroup.com](#) website is different. Rather than simply advocating a boycott, it engages in extortion both by threatening to post negative reviews about Xcentric’s customers, and by posting negative and false reviews about them.

The court finds that [scamgroup.com](#)’s negative reviews about Hagen Companies and Alpha Arms are false. Its several negative reviews of Alpha Arms purport to be from training course customers, but Alpha Arms has no training course customers. Its several negative reviews of the Hagen Companies purport to be from employees or investors, but Hagen Companies has no employees or investors.

Even if those reviews were true, however, they are extortive and therefore not constitutionally protected. One cannot threaten to disclose negative information about someone if they fail to do what you want. This is no different from the paparazzi who threaten to reveal embarrassing photos unless their demands are met.

The court finds a strong likelihood of success on the merits as to the postings on [scamgroup.com](#), but not as to the postings on [authorizedstatement.org](#) and [badforpeople.com](#).

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3. Jurisdiction Over Scamgroup.com.

There is no dispute that the court has jurisdiction over Defendant Michael Roberts, who was served and who appeared. Mr. Roberts acknowledges operating the websites authorizedstatement.org and badforpeople.org, but denies owning or controlling the website scamgroup.com. Much of the evidentiary hearing was devoted to the latter question.

Under ordinary jurisdiction principles, this distinction should not matter. The court can issue an injunction against Mr. Roberts, and if he violates the injunction then Xcentric's remedy is contempt against Mr. Roberts. As Xcentric explains it, however, the primary objective is not to enjoin Mr. Roberts so that the court's coercive power can be brought to bear on him. Rather, Xcentric intends to take any injunction to Google and/or other search engines in the hope that they would enforce it against offending websites. From that perspective, it arguably matters whether Roberts owns or operates scamgroup.com.

The court finds insufficient evidence that Mr. Roberts owns scamgroup.com. It certainly understands Plaintiff's suspicions. Mr. Roberts appears to know who operates that website, and there is strong evidence of some at least tacit cooperation among the websites. But the circumstantial evidence presented at the hearing is not enough to show that Mr. Roberts owns or operates scamgroup.com.

4. Irreparable Harm.

The court finds that Xcentric will likely suffer irreparable injury if a preliminary injunction does not issue. The wrongs alleged are to Xcentric's business and reputation, and appear designed for that purpose. Although a suit for money damages would be available if Mr. Roberts commits tortious interference, the court finds that the long term harm that could be caused by Mr. Roberts' actions likely would not be remedied by a money judgment against him.

5. Balance of Hardships.

The balance of hardships does not tip in favor of either party. If an injunction is not issued, Xcentric's business may continue to be harmed. If an injunction is issued, Mr. Roberts will be harmed by being prevented from getting his message out.

6. Public Policy.

For the first amendment reasons discussed above, public policy weighs against a preliminary injunction. There is a heavy presumption against prior restraints of speech. *See*

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Nash v. Nash, 232 Ariz. 473, 481-82, 307 P.3d 40, 48-49 (App. 2013). Given that the material on Roberts's two known websites does not amount to tortious interference, that presumption is not overcome.

7. Conclusion and Order.

Although Xcentric likely is suffering irreparable harm from Mr. Roberts's postings, the court finds that Xcentric is not likely to prevail on the merits against Mr. Roberts and that public policy weighs against a preliminary injunction. The request for preliminary injunction will therefore be denied. Because the court finds that it does not have jurisdiction over the owner of scamgroup.com, it makes no ruling regarding whether a preliminary injunction against that website is warranted.

IT IS ORDERED denying the application for preliminary injunction.

FILED: Exhibit Worksheet

/s/ RANDALL H. WARNER

JUDGE OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.